Supreme Court No. 94028-2

No. 73813-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHAUN WEBB,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Shaun Webb, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Webb appealed his conviction for custodial assault in Snohomish County Superior Court. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 22 of the Washington Constitution protect a criminal defendant's right to present a defense, including the rights to call witnesses and present relevant evidence. A defense of diminished capacity allows consideration of whether a mental disorder impaired the defendant's ability to form the requisite mental state to commit the crime charged. The trial court excluded testimony of a defense witness that would have testified concerning Mr. Webb's mental illness, which was caused by a traumatic brain injury. Did the court's ruling deny Mr. Webb the right to present a defense, and was the Court of Appeals decision thus in conflict with decisions of this Court, requiring this Court grant review? RAP 13.4(b)(1)?

2. Did trial counsel fail to provide the effective representation guaranteed under the state and federal constitutions, when counsel failed to raise the defense of diminished capacity, despite significant evidence of Mr. Webb's mental illness, and was the Court of Appeals decision thus in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

D. STATEMENT OF THE CASE

On May 14, 2014, Shaun Webb, an inmate at Monroe Correctional Center, attended a meeting with his mental health counselor, Alicia St. John. RP 47-48. Mr. Webb is confined to the Special Offender Unit (SOU) at Monroe, a unit reserved for inmates with diagnosed mental health conditions and other behavioral difficulties. RP 66.

Department of Corrections (DOC) officers were nearby, and DOC Sergeant Dennis Bennett attended the meeting as well. RP 47-48, 75-76. DOC staff members testified that Mr. Webb became upset as he spoke with Ms. St. John, his counselor. RP 75. As Mr. Webb's voice escalated, Sergeant Bennett told Mr. Webb repeatedly that the meeting was over and ordered Mr. Webb to return to his cell. RP 51-53. When Mr. Webb refused to do so, one of the DOC officers told Ms. St. John to leave the program room, and the sergeant issued a distress signal for the Quick Response Strike (QRS) team to respond to the program room. RP 55-56.

The QRS team began to arrive within seconds. RP 57-58, 77, 86. Sergeant Bennett ordered Mr. Webb to kneel, so that he could be restrained. RP 59-61. When Mr. Webb refused, Sergeant Bennett grabbed Mr. Webb's arm. Id. Mr. Webb pulled his arm away, and his hand apparently came into contact with the sergeant's face. Id.; at 160-63.[1] Mr. Webb was then tackled by at least eight DOC officers, who restrained him and escorted him to segregation, where he remained. RP 167. Sergeant Bennett stated he had a headache following the incident, but required no medical attention and took no time off from work. RP 62-63, 65, 71. Mr. Webb, however, required hospitalization for several weeks following this incident. CP 83.[2]

Mr. Webb was charged with one count of custodial assault against Sergeant Bennett. CP 163-64.

At trial, the State moved in limine to exclude evidence related to Mr. Webb's mental health diagnoses or conditions. RP 4-5. Mr. Webb argued that his mental health was relevant to his defense, to provide context for Mr. Webb's actions, and to show bias on the part of the

[1] The DOC witnesses, including Sergeant Bennett, described the contact as a "punch;" Mr. Webb denied punching Bennett, and described it a "smack," maintaining it was accidental. RP 160.

[2] DOC officers admitted that Mr. Webb sustained a number of blows and punches to the head while on the ground; Mr. Webb was hospitalized for several weeks following the incident in May 2014. RP 73, 85, 91(Officer Miller: "I struck him with my right hand several times in the head"); CP 83.

corrections staff. RP 5. Mr. Webb argued his due process right to present a defense included the right to testify about his mental health condition, as well as to present evidence of his condition through Ms. St. John, and by cross-examination of the State's witnesses. RP 5-7. The court disagreed, granting the State's motion and excluding evidence of Mr. Webb's mental health condition. RP 6-7.

The jury convicted Mr. Webb of the sole count of custodial assault. CP 141.

Mr. Webb appealed, raising the issues raised herein. On November 28, 2016, the Court of Appeals affirmed his conviction. Appendix.

He seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

1. The trial court excluded Mr. Webb's proffered evidence regarding his mental health condition.

Prior to trial, the trial court granted the State's motion in limine barring the testimony of DOC mental health counselor Alicia St. John regarding Mr. Webb's mental health condition or any evidence of diminished capacity. RP 7.

The deputy prosecutor argued the evidence was inadmissible, as Mr. Webb had asserted a defense of general denial, purportedly making Mr. Webb's mental health condition "irrelevant and confusing," in light of the elements of custodial assault. RP 4.

The trial court excluded the proffered testimony concluding "none of that is relevant to an element of the crime or a claim of defense." RP 6. The court noted that "a claim of defense" might make the testimony concerning Mr. Webb's mental health relevant, "but only if there was a defense of diminished capacity being raised. Not in this case." RP 7.

Once the trial court excluded Mr. Webb's expert witness, Mr. Webb's ability to introduce evidence related to his mental health condition was completely undermined. Unable to present evidence of traumatic brain injury – the source of his mental health condition – or of the potential impact upon his ability to form intent, Mr. Webb offered only his own testimony in his defense. RP 160-67, 209-10.

2. Mr. Webb was constitutionally entitled to present a defense.

The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to

present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

This Court held in Jones, that as long as evidence is minimally relevant,

> ". . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need."

Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)) (internal citations omitted).

A defense of diminished capacity allows consideration of whether a mental disorder, not amounting to insanity, impaired the defendant's ability to form the requisite mental state to commit the

crime charged. State v. Ellis, 136 Wn.2d 498, 522-23, 963 P.2d 843 (1998).

The admission of expert testimony regarding a defense of diminished capacity, like expert testimony on other topics, is governed by ER 401, ER 402 and ER 702. ER 702 permits the admission of expert opinion if it is "helpful to the trier of fact under the particular facts of the specific case in which the evidence is sought to be admitted." State v. Green, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999). The opinion is helpful if it "explains how the mental disorder relates to the asserted impairment of capacity." State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000) (citing Green, 139 Wn.2d at 74). "It is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question - only that it could have." Mitchell, 102 Wn. App. at 27. It was erroneous for the Court of Appeals to find that the proffered testimony of Ms. St. John, Mr. Webb's mental health counselor, was not admissible.

Alicia St. John, as Mr. Webb's mental health counselor at the Special Offender Unit, could have testified to Mr. Webb's special needs as a result of a childhood traumatic brain injury. CP 82. Ms. St.

John could have testified to Mr. Webb's seizure disorder and diagnosed cognitive disorder, which can affect his ability to make decisions and form intent. Id. Ms. St. John's experience with Mr. Webb as his counselor would have provided the jury with helpful information relevant to the issue of Mr. Webb's capacity to form the requisite mental state to commit the assault charged. See Mitchell, 102 Wn. App. at 27.

The excluded evidence in Mr. Webb's case included a history of traumatic brain injury resulting in permanent brain damage, seizures, and a cognitive disorder. RP 5-10, 209; CP 82. Accordingly, the trial court erred when it excluded evidence relevant to the issue of Mr. Webb's capacity to form the requisite mental state to commit the assault charged. Mitchell, 102 Wn. App. at 27.

The Court of Appeals held that Ms. St. John's testimony was not admissible, due to trial counsel's failure to assert a diminished capacity defense below. Appendix at 5-6. To the degree that defense counsel's failures are responsible for the exclusion of Ms. St. John's testimony, the Court of Appeals decision requires review, for the Court's failure to consider the Sixth Amendment violation in light of trial counsel's ineffectiveness. See infra.

3. To the degree Mr. Webb's trial counsel failed to pursue a diminished capacity defense, Mr. Webb was denied the effective assistance of counsel.

Although the trial court committed reversible error when it excluded the testimony of Ms. St. John, Mr. Webb's trial counsel also failed to provide constitutionally effective representation when she failed to pursue a diminished capacity defense.

A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the

defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698.

Although the failure to request a diminished capacity instruction is not ineffective assistance of counsel per se, it is deficient representation when it is not based on sound trial strategy. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001) (applying Strickland analysis to counsel's failure to request diminished capacity instruction, once it is determined defendant would have been entitled to it); see also In re Personal Restraint of Hubert, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007); State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

Mr. Webb's case resembles Thomas, where trial counsel failed to competently present a diminished capacity defense based on voluntary intoxication. 109 Wn.2d at 223. This Court concluded the failure to offer a critical jury instruction which would have "better enabled [defense] counsel to argue the defense's theory of the case" deprived the defendant of the effective assistance of counsel. Id. at 227. This Court found counsel ineffective because "[a] reasonably competent attorney would have been sufficiently aware of relevant

legal principles to enable him or her to propose an instruction based on pertinent cases." Thomas, 109 Wn.2d at 229. The Thomas Court concluded that "defense counsel's representation fell below an objective standard of reasonableness." 109 Wn.2d at 232 (citing Strickland, 466 U.S. at 688).

In State v. Tilton, the Court acknowledged that the "[f]ailure of the defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the Strickland test." 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (citing Thomas, 109 Wn.2d at 226-29) (holding that despite a limited record, counsel was ineffective for failing to raise diminished capacity defense).

In Mr. Webb's case, there was substantial evidence to support a diminished capacity defense. RP 5-10, 209; CP 82. It is also apparent that Mr. Webb's trial counsel was well aware of Mr. Webb's mental health condition, as well as its potential effects on his behavior and ability to control his actions. RP 5, 209; CP 82 (stating that Mr. Webb's mental health and seizure disorders, as well as his cognitive disorder, were caused by permanent brain damage suffered as a child). It should not have escaped anyone's notice that he was also residing at

the SOU at the time of the crime charged – a facility for chronically mentally ill offenders.

If counsel had pursued a diminished capacity defense, she could have argued that Mr. Webb's mental state negated the mens rea required for the offense of custodial assault. See Thomas, 109 Wn.2d at 227.

As in Thomas, Hubert, and Powell, supra, counsel had no tactical basis for failing to pursue this defense. Here, trial counsel's defense was enfeebled – counsel raised Mr. Webb's mental health issues only briefly at sentencing, rather than following a proper investigation, with the support of expert witness testimony. RP 209 ("I don't think [Mr. Webb] quite processes at the level as maybe general population. He has significant mental health conditions ... which has resulted in permanent brain damage"). Although trial counsel for Mr. Webb objected to the State's motion in limine, the objection was not well-supported by counsel's investigation or a proffer of expert testimony. RP 5-9 ("I'm not asking for – to go in depth at all in terms of Mr. Webb's mental health. We are not arguing any type of diminished capacity").

There was substantial evidence of a mental health condition that logically and reasonably connected Mr. Webb's mental condition with his inability to form the required intent for custodial assault. Thus, "defense counsel's representation fell below an objective standard of reasonableness." Thomas, 109 Wn.2d at 232 (citing Strickland, 466 U.S. at 688).

4. The exclusion of the mental health testimony was not harmless; therefore, review is warranted.

"[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Ritchie, 480 U.S. at 56. Mr. Webb had

> the right to present a defense, the right to present [his] version of the facts as well as the prosecution's to the jury so it may decide where the truth lies ... he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19. By improperly excluding otherwise admissible evidence, the court denied Mr. Webb the opportunity to put forward his "version of the facts," denied him the right to challenge the State's theory, and thus, denied him the right to present a defense.

A constitutional error may be deemed harmless only where the State proves beyond a reasonable doubt the error did not contribute to the

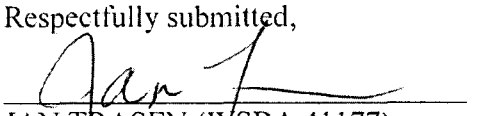
verdict obtained. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Thus, the State must prove beyond a reasonable doubt that the jury would have reached the same verdict had it heard the excluded testimony of Ms. St. John that it was possible that Mr. Webb's capacity was diminished at the time he committed the offense. Review should be granted. RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 22nd day of December, 2016.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHAUN WEBB, Appellant.	)	No. 73813-5-I DIVISION ONE UNPUBLISHED OPINION FILED: November 28, 2016

TRICKEY, A.C.J. — Shaun Webb appeals his conviction for custodial assault. He argues that the trial court erroneously granted the State's motion in limine barring evidence of his mental illness, thereby precluding him from presenting a defense. Because his counsel did not raise a diminished capacity defense, we hold that barring evidence of his mental illness did not interfere with his right to present a defense. Webb also argues that his trial counsel failed to provide effective representation by not raising the defense of diminished capacity. The record is insufficient to find ineffective assistance of counsel, and we affirm.

FACTS

Webb is an inmate at the Washington State Department of Corrections Monroe Correctional Complex. He resides in the Special Offender Unit, which is reserved for inmates with diagnosed mental health conditions and other behavioral difficulties. On May 14, 2014, Webb met with Alicia St. John, his mental health counselor. The meeting took place in the Correctional Complex's program room, and Sergeant Dennis Bennett accompanied Webb.

During the meeting, Webb became agitated. Sergeant Bennett repeatedly ordered Webb to return to his cell. St. John was instructed to leave the program

room and Sergeant Bennett issued a distress signal for the Quick Response Strike Team, who responded rapidly.

Sergeant Bennett ordered Webb to kneel down, which Webb refused to do. Sergeant Bennett grabbed Webb's right arm, which Webb pulled away. Webb closed his hand into a fist, and punched Sergeant Bennett in his temple. Multiple correctional officers tackled Webb, restrained him, and escorted him to segregation.

Webb was charged with one count of custodial assault against Sergeant Bennett.

Prior to trial, the State moved in limine to exclude evidence related to Webb's mental health diagnoses or conditions. Webb stated that he was only raising a general denial defense, not one based on diminished capacity.

The trial court granted the State's motion in limine, reasoning that Webb's mental condition was not relevant to an element of custodial assault if a defense of diminished capacity was not raised.

The jury convicted Webb of custodial assault. He appeals.

ANALYSIS

Motion in Limine

Webb argues that the trial court deprived him of his constitutional right to present a defense when it granted the State's motion in limine to exclude evidence relevant to his mental illness. We disagree.

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" State v.

Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This encompasses a defendant's right to an opportunity to be heard in his defense, including the rights to confront and cross-examine witnesses against him and offer testimony. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

This right is not absolute, and defendants do not have a right to have irrelevant evidence admitted. Darden, 146 Wn.2d at 624; ER 402. But if evidence is relevant, it must be admitted unless the State can show that the evidence is so prejudicial that it would disrupt the fairness of the fact-finding process. Darden, 145 Wn.2d at 622.

"A person is guilty of custodial assault if that person is not guilty of an assault in the first or second degree and where the person . . . [a]ssaults a full or part-time staff member or volunteer . . . at any adult corrections institution or local adult detention facilities who was performing official duties at the time of the assault." RCW 9A.36.100(1)(b). Washington courts apply common law definitions of the elements of "assault." State v. Aumick, 73 Wn. App. 379, 382, 869 P.2d 421 (1994). An essential element of assault is the specific intent either to create apprehension of bodily harm or to cause bodily harm. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

A defendant may raise the defense of diminished capacity to argue that he or she lacked the ability to form a specific intent due to a mental disorder not amounting to insanity. State v. Ferrick, 81 Wn.2d 942, 944, 506 P.2d 860 (1973).

A decision to admit or exclude evidence lies within the sound discretion of the trial court. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). A court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). This court reviews a claim of denial of constitutional rights de novo. Brown v. State, 155 Wn.2d 254, 261, 119 P.3d 341 (2005). Therefore, this court reviews Webb's claim of denial of his Sixth Amendment rights de novo. State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

Webb argued that the officers' knowledge of his mental status was relevant to show the officers' motivation and bias in their actions toward him. Webb argued that the officers knew of his mental illness, and the evidence would be relevant to showing the jury the context of the incident. In addition, Webb argued it would be relevant in terms of cross-examining the officers on their actions toward Webb. Webb specifically stated that he was not planning to offer evidence of his mental condition for the purpose of proving the bias of the State's witnesses.

These arguments are insufficient to show that evidence of Webb's mental status is relevant to his charge of custodial assault absent a defense of diminished capacity. Webb was not offering evidence of his mental status to show that one the elements of custodial assault had not been met. He was also not offering it to show that the officers would be biased in their testimony against him. Rather, it was being offered to show the officers' actions toward Webb. Because evidence of Webb's mental status was not being offered to show that the elements of

custodial assault had not been met or that the officers may have been biased against him in their testimony at trial, the evidence was not relevant.

On appeal, Webb argues that his mental illness was relevant to his diminished capacity. A defendant may raise the defense of diminished capacity to argue that he or she lacked the ability to form a specific intent due to a mental disorder not amounting to insanity. Ferrick, 81 Wn.2d at 944. A defendant must produce expert testimony in support of a diminished capacity defense. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). A witness may be qualified as an expert by knowledge, skill, experience, training, or education. ER 702. The defendant must disclose the identities and statements of those he intends to call as witnesses, the general nature of the defense raised, and a list of expert witnesses and the content of their testimony. CrR 4.7(b)(1), (b)(2)(xiv), (g). Washington courts do not consider issues raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

Prior to trial, Webb stated that he was raising a general denial defense, not one based on diminished capacity. This was before the trial court had ruled on the State's motion in limine. Webb was not precluded from raising the defense because of the court's granting of the motion in limine; he had already decided to not raise it. The trial court's granting of the motion did not prevent Webb from presenting a defense.

Webb also failed to produce an expert witness to corroborate a defense of diminished capacity, but argues on appeal that his mental health counselor, St. John, would have qualified. At trial, Webb offered St. John as a defense witness

to testify generally about his mental health status. Webb did not provide any information to qualify St. John as an expert witness. Webb's arguments on appeal that St. John was an expert witness who could testify as to his ability to form intent do not remedy trial counsel's failure to raise this issue below.

By not raising a diminished capacity defense, Webb did not put the effect of his mental status on his ability to form the requisite intent into issue. The trial court reasoned that, without a diminished capacity defense, Webb's mental status was irrelevant to showing that an assault had occurred. We agree.

Ineffective Assistance of Counsel

Webb argues that he was denied effective assistance of counsel when his trial counsel failed to pursue a diminished capacity defense. The record before the court is insufficient to sustain a finding of ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that "(1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant." State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). An appellate court presumes that the defendant was properly represented and that performance was not deficient. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Prejudice results when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been

different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If either part of the test is not satisfied, the inquiry ends. Lord, 117 Wn.2d at 883-84; State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

Where a claim of ineffective assistance of counsel is brought on direct appeal, the reviewing court will not consider matters outside the trial record. State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); accord State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the briefing but not included in the record cannot be considered on appeal). The burden is on the defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

Several cases have found ineffective assistance of counsel in the context of a failure to raise a defense. However, these cases involved instances where significant evidence in the record supported a defense theory that trial counsel did not adequately pursue. See State v. Cienfuegos, 144 Wn.2d 222, 225, 25 P.3d 1011 (2001) (defendant's impairment due to withdrawal symptoms and cognitive disorder supported by expert testimony); In re Pers. Restraint of Humbert, 138 Wn. App. 924, 928-29, 158 P.3d 1282 (2007) (defendant's testimony supported defense of reasonable belief that other person was not mentally incapacitated to attempted rape); State v. Powell, 150 Wn. App. 139, 154-56, 206 P.3d 703 (2009) (testimony of defendant, witness, and victim supported defense of reasonable belief that other person was not mentally incapacitated to attempted rape);

Thomas, 109 Wn.2d at 227-28 (defense theory of the case was that the defendant was too intoxicated to form the requisite intent, but counsel did not request a diminished capacity instruction or make the subjectivity of the required intent clear despite introduction of facts supporting the instructions); State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (despite incomplete record, sufficient evidence submitted during trial and references during sentencing hearing to expert opinions supporting unpursued defense theory to merit new trial).

A claim of ineffective assistance of counsel presents a mixed question of fact and law and is reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Here, the record is insufficient to support a finding of ineffective assistance of counsel. Webb's trial counsel was aware of Webb's mental illness diagnoses. But there is no evidence in the record explaining how these diagnoses would have been related to a diminished capacity defense. Webb did not produce any expert testimony or affidavits to show that his mental illness affected his ability to form the intent required for custodial assault. The record does not disclose the reason why Webb's trial counsel elected to not pursue a diminished capacity defense, and we cannot evaluate whether this decision fell within the range of acceptable representation.

We disagree with the State's position that the record is complete and Webb's testimony at trial is sufficient to find that he did not suffer from diminished capacity. We are not in a position to evaluate Webb's mental state at the time of the incident. The trial court excluded evidence of Webb's mental health status, no

testimony or affidavits concerning Webb's mental condition were submitted, and Webb's trial testimony is not a sufficient basis for the court to evaluate his diminished capacity.

We affirm.

Trickey, ACJ

WE CONCUR:

Schindler, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73813-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Mara Rozzano, DPA
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Snohomish County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: December 22, 2016